

PUBLIC LAW BOARD NO. 2529

Joseph Lazar, Referee

AWARD NO. 3

CASE NO. 3

PARTIES)
 TO)
 DISPUTE)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
 and
 FORT WORTH AND DENVER RAILWAY COMPANY

**STATEMENT
OF CLAIM:**

1. That the Carrier violated the Agreement when as a result of an investigation conducted at Ft. Worth, Texas, April 29, 1980, they dismissed Section Laborer K. E. Carson, said dismissal being without just cause and without due process.
2. That Claimant K. E. Carson be reinstated to his former position of Section Laborer with seniority, vacation and all other rights unimpaired and additionally he be compensated for all wage loss suffered account the Carrier's improper action.

FINDINGS :

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employee and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Claimant Section Laborer K. E. Carson, on May 20, 1980, was sent a letter by Carrier showing him to be dismissed from the service May 13, 1980 for violation of Rules 665 and 667 of Burlington Northern Safety Rules and Maintenance of Way Notice #2-2 in connection with being absent from duty without proper authority while employed as a Section Laborer at Fort Worth, Texas on April 16, 1980, and thereafter as evidenced by formal investigation afforded him at Fort Worth, Texas, Tuesday, April 29, 1980.

BN Safety Rule 665 reads:

"EMPLOYEES MUST REPORT FOR DUTY AT THE DESIGNATED TIME AND PLACE. THEY MUST BE ALERT, ATTENTIVE AND DEVOTE THEMSELVES EXCLUSIVELY TO THE COMPANY'S SERVICE WHILE ON DUTY. THEY MUST NOT ABSENT THEMSELVES FROM DUTY, EXCHANGE DUTIES WITH OR SUBSTITUTE OTHERS IN THEIR PLACE WITHOUT PROPER AUTHORITY."

BN Safety Rule 667 reads:

"MEN MUST COMPLY WITH INSTRUCTIONS FROM THE PROPER AUTHORITY."

Carrier Instruction to ALL MAINTENANCE OF WAY EMPLOYEES (dated May 9, 1979) Notice 2-2, Subdivision All, Division Fort Worth:

"EFFECTIVE AT ONCE THE FOLLOWING WILL GOVERN WITH RESPECT TO REQUESTS FOR TIME OFF DURING ASSIGNED WORKING DAYS:

1. ALL REQUESTS FOR TIME OFF MUST BE APPROVED IN ADVANCE BY FOREMAN IN CHARGE.
2. ALL PERSONNEL REQUESTING FOR TIME OFF DUE TO SICKNESS IN EXCESS OF ONE DAY MUST HAVE DOCTOR'S STATEMENT BEFORE RETURNING TO WORK.
3. ALL REQUESTS FOR TIME OFF FOR PERSONAL REASONS MUST BE APPROVED BY ROADMASTER IN CHARGE OR B&B SUPERVISOR."

Claimant, on April 4, 1980, requested in writing from the Carrier a 60 day leave of absence commencing April 7, 1980 and extending through June 6, 1980, account personal business. This request was denied by the Carrier on April 14, 1980, by Certified Mail, Return Receipt Requested, but the envelope was addressed to Claimant's former address and never delivered to him as mailed. Similarly, the notice of dismissal of May 20, 1980 was sent to Claimant's former address and was not delivered to him. The Carrier's notice of investigation, dated April 23, 1980, properly addressed, was delivered to Claimant's mother on May 12, 1980 subsequent to the investigation which was actually conducted on April 29, 1980, as scheduled.

Claimant reported for service on June 6, 1980 and learned that his request for leave had been denied, that an investigation had been held, and that he had been terminated.

Rule 26, the DISCIPLINE rule, provides that an employee "shall be apprised, in writing, of the charges preferred against him and be present at such investigation and may be represented by his duly authorized representative of the Organization party to this agreement." The Transcript of Investigation states:

"Let the records show that this letter of instructions was mailed and postmarked April 23, 1980. Letter was sent certified mail signature requested. Let the records show certified mail #226148 was issued by the U. S. Postal Department. Let the records show that the U. S. Postal Department attempted to deliver this letter April 25, 1980, but was unclaimed. The Postal Department maintains information has been left for Mr. Carson to pick up this certified mail. Let the records show that as of this investigation, letter has not been claimed by Mr. K. E. Carson. Attached as Exhibit A to this investigation is receipt for certified mail #226148." (Transcript, page 1).

The Rule 26 rights of notice, to be present at investigation, and of representation are fundamental rights of the most basic character. The Carrier can no more be trifling with such basic rights than can an employee deliberately evade and frustrate a serious effort of the Carrier to honor such rights. The evidence before this Board does not establish the slightest indication that Claimant deliberately sought to evade or to frustrate the investigation by refusing acceptance of the notice. To the contrary, the evidence convincingly shows that Claimant did not know of the rejection of his request for leave of absence and would have little basis in knowledge to think that he was subject to investigation and discipline for absence without leave. The holding of the investigation, on April 29, 1980, followed closely the mailing of the notice on April 23, without the making of any further effort by the Carrier to communicate any actual notice of the investigation to the Claimant. In the circumstances of this particular case, the burden of the Carrier's obligation under Rule 26 cannot be said to have been satisfied.

The Carrier points out, and the record shows, that Claimant presented his request for leave of absence on extremely short notice and that Claimant proceeded to absent himself from duty without benefit of proper authority. Absenteeism without proper authority is a serious matter and subjects an employee, in a proper case, to the serious risk of dismissal. The correct alternative is to report for duty and then to grieve. In the instant case, the Claimant chose to take the alternative that left him open to the risk of dismissal. Obviously, no matter how sensitive the Management of the Railway Company may be to the needs of its employees, it cannot tolerate such self-help tactics. Claimant's abrupt and unexpected behavior, involving two months off, without advance warning or information to the Carrier to afford opportunity for other work arrangements, was obviously not sensitive to the Carrier's position. Clearly, there is merit here in the Carrier's argument.

Nevertheless, it is of utmost importance that the provisions of the Agreement, in Rule 26 as noted, be maintained in the wholeness of their integrity and purpose. As stated above, in the circumstances of this particular case, the burden of the Carrier's obligations under Rule 26 cannot be said to have been satisfied. The Board has no alternative, in the circumstances, but to give effect to paragraph (c) of Rule 26, which provides:

"Unsustained Charges (c): If the charge against an employe is not sustained, it shall be stricken from the records. If the employe has been suspended or dismissed from service and the charges are not sustained, such employe will be reinstated with his seniority rights unimpaired and be compensated for wage loss, if any, suffered by him resulting from said suspension or dismissal."

A W A R D

1. The Carrier is in violation of the Agreement.
2. The Claim is sustained.

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Joseph Lazar
JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

S. E. Fleming
S. E. FLEMING, EMPLOYE MEMBER

B. J. Mason
B. J. MASON, CARRIER MEMBER

DATED: 10-19-81